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Sarah Somers
National Health Law Program, somers@healthlaw.org

Jane Perkins
National Health Law Program, perkins@healthlaw.org

Abigail Coursolle
National Health Law Program, coursolle@healthlaw.org

Sarah Grusin
National Health Law Program, grusin@healthlaw.org

ACCESS TO COURT CASES FROM THE SUPREME COURT'S 2020–2021 TERM: THE NEW MAJORITY'S DEBUT

SARAH SOMERS,* JANE PERKINS,** ABIGAIL COURSOLLE*** & SARAH GRUSIN****

ABSTRACT

Throughout the Supreme Court's first term without Justice Ruth Bader Ginsburg, the Court issued only a few major opinions with respect to access to the Court for civil litigants, and it issued none that discarded major precedents. Yet, in several areas, the Court demonstrated an increasingly conservative bent and began to lay the groundwork for major changes. In this Article, we discuss selected opinions from the Court's 2020–2021 term that may have an impact on access to the courts for individuals seeking to vindicate civil and constitutional rights. In particular, it focuses on cases that may affect access for low-income and marginalized people. These opinions show the work of a Court in transition and foretell major changes to come.

* Sarah Somers, J.D., M.P.H., is a Managing Attorney at the National Health Law Program NHeLP.
** Jane Perkins, J.D., M.P.H., is the Legal Director at (NHeLP).
*** Abigail Coursolle, J.D., is a Senior Attorney at NHeLP.
****Sarah Grusin, J.D., is a Staff Attorney at NHeLP. The attorneys participate in NHeLP's Federal Court Access Group.

I. INTRODUCTION

The Supreme Court's 2020–2021 term marked the beginning of a new era for the Court. When it convened in October, only eight justices heard arguments.[1] Justice Ruth Bader Ginsburg died on September 18, 2020, leaving her seat vacant for the first time since 1993.[2] After one month, Justice Amy Coney Barrett joined the Court.[3] The recent additions of Justices Neil Gorsuch and Brett Kavanaugh, both in their fifties, had already reinforced the Court's 5–4 conservative majority.[4] The replacement of Ginsburg, arguably the leading liberal jurist of the last three decades, with the young, conservative Barrett cemented a deeply conservative majority on the Court for years to come—one with the potential to remake the law on a wide range of issues.[5]

Even so, the first term of this new 6–3 majority resulted in only a few major opinions with respect to access to the Court for civil litigants and none that discarded major precedents. Yet, in several areas, the Court demonstrated an increasingly conservative bent and began to lay the groundwork for major changes.[6] Some cases addressing standing, statutory interpretation, and administrative procedures evidenced a restrictive view of the enforcement of individual statutory rights and the ability to bring class actions.[7] In contrast, the Court showed particular interest in First Amendment Free Exercise Clause claims and special solicitude for individuals asserting those rights against

1. Steven R. Smith, *A Pandemic Term with "Highly Charged Issues": The U.S. Supreme Court 2020-2021*, 47 J. HEALTH SERV. PSYCH. 207, 207 (2021).

2. Nina Totenberg, *Justice Ruth Bader Ginsburg, Champion of Gender Equality, Dies at 87*, NAT'L PUB. RADIO (Sept. 18, 2020, 7:28 PM), https://www.npr.org/2020/09/18/100306972/justice-ruth-bader-ginsburg-champion-of-gender-equality-dies-at-87; *Process to Fill the Vacated Seat of Justice Ruth Bader Ginsburg*, BALLOTPEDIA, https://ballotpedia.org/Process_to_fill_the_vacated_seat_of_Justice_Ruth_Bader_Ginsburg (last visited Apr. 8, 2022).

3. Adam Liptak, *Justice Amy Coney Barrett Hears Her First Supreme Court Argument*, N.Y. TIMES, https://www.nytimes.com/2020/11/02/us/politics/amy-coney-barrett-supreme-court.html#:~:text=the%20main%20story-,Justice%20Amy%20Coney%20Barrett%20Hears%20Her%20First%20Supreme%20Court%20Argument,prisoner%20held%20in%20abusive%20conditions (last updated Nov. 26, 2020).

4. ALL. FOR JUST., SUPREME COURT NOMINEE REPORT: FIRST LOOK – BRETT KAVANAUGH 1 (2018).

5. Seung Min Kim, *Senate Confirms Barrett to Supreme Court, Cementing Its Conservative Majority*, WASH. POST (Oct. 26, 2020), https://www.washingtonpost.com/politics/courts_law/senate-court-barrett-trump/2020/10/26/df76c07e-1789-11eb-befb-8864259bd2d8_story.html.

6. Amelia Thomson-DeVeaux & Laura Bronner, *The Supreme Court's Conservative Revolution Is Already Happening*, FIVETHIRTYEIGHT (Oct. 20, 2021, 6:00 AM), https://fivethirtyeight.com/features/the-roberts-court-vs-the-trump-court/; Ian Millhiser, *The Supreme Court Is Drunk on its Own Power*, VOX (Sept. 14, 2021, 12:40 PM), https://www.vox.com/22662906/supreme-court-conservatives-abortion-constitution-roe-wade.

7. David Gunter et al., CONG. RSCH. SERV., R46910, THE SUPREME COURT'S OCTOBER 2020 TERM: A REVIEW OF SELECTED MAJOR RULINGS 1, 19, 25 (2021).

governments.[8] Also notable on the procedural side was the Court's increasingly heavy use of the controversial "shadow docket," in which it issues rulings on an expedited basis without full argument, briefing, or opinions.[9] In addition, the Court issued more *per curiam* opinions with dissents, a practice that also drew criticism.[10]

In this Article, we discuss selected opinions from the Court's 2020–2021 term that may have an impact on individuals' access to the courts and their ability to obtain relief for violations of civil and constitutional rights. In particular, we focus on cases that may affect access for low-income and marginalized people. The opinions we discuss address major political questions including the census apportionment,[11] immigration,[12] and the Affordable Care Act (ACA),[13] as well as statutory claims under consumer[14] and environmental protection acts.[15] We also discuss a number of opinions addressing various claims under the First Amendment, including challenges to restrictions intended to combat the spread of COVID-19. These opinions show the work of a Court in transition and hint of big changes to come.

II. STANDING

A number of this term's opinions dealt with the constitutional standing requirement. Article III of the U.S. Constitution limits the power of federal courts to "cases" or "controversies."[16] Courts may not entertain claims that assert only generalized grievances, but rather, must find that the party bringing the claim has a particular stake in the case.[17] To meet Article III's requirements, plaintiffs must show (1) injury in fact (2) that is fairly traceable to the

8. Valerie C. Brannon, CONG. RSCH. SERV., LSB10551, SUPREME COURT CONSIDERS OVERRULING FREE EXERCISE PRECEDENT IN *FULTON V. PHILADELPHIA* 1 (2020); Fulton v. City of Philadelphia, 141 S. Ct. 1868, 1883 (2021).

9. Barry P. McDonald, *This Is the Shadiest Part of the Supreme Court*, N.Y. TIMES (Nov. 3, 2021), https://www.nytimes.com/2021/11/03/opinion/supreme-court-shadow-docket.html; *see also* Samantha O'Connell, *Supreme Court "Shadow Docket" Under Review by U.S. House of Representatives*, A.B.A. (Apr. 14, 2021), https://www.americanbar.org/groups/committees/death_penalty_representation/publications/project_blog/scotus-shadow-docket-under-review-by-house-reps/.

10. Ira P. Robbins, *Hiding Behind the Cloak of Invisibility: The Supreme Court and Per Curiam Opinions*, 86 TULANE L. REV. 1197, 1199 (2012); *Supreme Court Cases, October Term 2020-2021*, BALLOTPEDIA, https://ballotpedia.org/Supreme_Court_cases,_October_term_2020-2021 (last visited Apr. 10, 2022).

11. Trump v. New York, 141 S. Ct. 534 (2020).

12. Niz-Chavez v. Garland, 141 S. Ct. 1474, 1478 (2021); Pereida v. Wilkinson, 141 S. Ct. 754, 758 (2021); Johnson v. Guzman Chavez, 141 S. Ct. 2271, 2280 (2021).

13. California v. Texas, 141 S. Ct. 2104, 2112 (2021).

14. TransUnion LLC v. Ramirez, 141 S. Ct. 2190, 2200 (2021).

15. Territory of Guam v. United States, 141 S. Ct. 1608, 1611 (2021).

16. U.S. CONST. art. III, § 2, cl. 1.

17. *TransUnion LLC*, 141 S. Ct. at 2203.

defendant's conduct, and seek (3) a remedy likely to address that injury.[18] The standing requirement naturally limits access to federal court for individual claimants and thus can pose a significant barrier to access to the courts.[19]

Split decisions in several standing cases kept plaintiffs and claims out of court, with potentially profound implications for future claims based on statutory violations. A case likely to have far-reaching consequences for future litigants was *TransUnion LLC v. Ramirez*, which addressed claims under the Fair Credit Reporting Act (FCRA).[20] The Court considered the first requirement for standing: injury in fact. The Court reaffirmed its 2016 decision in *Spokeo v. Robins*, which held that a statutory violation alone does not automatically satisfy the injury-in-fact requirement.[21] It then went a step further, holding that risk of future harm does meet the concreteness requirement for damages claims, narrowing a path to court left open by *Spokeo*.[22] The decision also marks a retreat from the landmark ruling in *Lujan v. Defenders of Wildlife* that "Congress has the power to define injuries and articulate chains of causation that will give rise to a case or controversy where none existed before" and raises serious questions about the future viability of many statutory claims.[23]

Credit reporting agency TransUnion L.L.C. offered a service that informed participating businesses whether a consumer's name potentially matched one on the Office of Foreign Assets Control's (OFAC) list of individuals deemed a threat to national security.[24] If a consumer's name matched one on the list, TransUnion placed an alert on their credit report indicating a "potential match."[25] TransUnion's process flagged the credit reports of many people who were not threats to national security, including plaintiff Sergio Ramirez.[26] Mr. Ramirez discovered this when he was denied a loan to buy a car because, according to the salesman, he was on a "terrorist list."[27] He called TransUnion to request a credit report.[28] The agency sent him a statutorily required summary of rights and his credit report, which did not mention the OFAC alert.[29] The next day, TransUnion sent a second mailing that alerted him to the OFAC notation in his report, but did not include the summary of rights.[30]

18. *Id.* (citing Lujan v. Defenders of Wildlife, 504 U.S. 555, 560–61 (1992)).

19. *See* Erwin Chemerinsky, *What's Standing After* TransUnion LLC v. Ramirez, 96 N.Y.U. L. REV. ONLINE 269, 282–83 (2021).

20. *TransUnion LLC*, 141 S. Ct. at 2200.

21. *Id*. at 2205.

22. *Id.* at 2212; *id.* at 2214, 2222–23 (Thomas, J., dissenting).

23. *See* Chemerinsky, *supra* note 19, at 278.

24. *TransUnion LLC*, 141 S. Ct. at 2201.

25. *Id.*

26. *Id.*

27. *Id.*

28. *Id.*

29. *TransUnion LLC*, 141 S. Ct. at 2201.

30. *Id.* at 2201–02.

Mr. Ramirez brought a class action suit against TransUnion, alleging three violations of the FCRA.[31] First, Ramirez alleged that TransUnion failed to follow reasonable procedures to ensure the accuracy of information in his credit file.[32] Second, he alleged that in its first mailing, TransUnion failed to provide all information in his credit file; specifically, that his name was a potential match for a name on the OFAC list.[33] Third, he alleged that TransUnion failed to comply with the requirement to provide a written summary of rights with each disclosure, because it failed to include the summary of rights with the second mailing that alerted him to the OFAC match.[34]

The parties stipulated to certification of a class that included 8185 consumers who had the OFAC notation in their files and also received mailings that did not include their statutorily-required summary of rights.[35] They also stipulated that TransUnion actually disseminated credit reports containing the OFAC information regarding only 1853 plaintiffs.[36] The remainder of the class members had OFAC alerts in their credit files but the information was not disseminated to third parties.[37] The District Court found that the entire class had standing, and a jury returned a verdict in favor of the class.[38] A divided Ninth Circuit affirmed the holding on standing and liability, but reduced the amount of damages awarded.[39]

In a 5–4 decision written by Justice Kavanaugh, the Court held that only the 1853 plaintiffs whose credit reports were disseminated to third parties had suffered an injury sufficient to confer standing.[40] The majority focused on the requirement that an injury be "concrete."[41] While an injury need not be tangible to confer standing, the majority held, intangible injuries resulting from violations of statutorily created rights must have a close relationship to harms traditionally recognized as providing a basis for lawsuits, such as reputational harms.[42] In contrast, while Congress may create a statutory prohibition or obligation, it may not "simply enact an injury into existence using its lawmaking power to transform something that is not remotely harmful into something that

31. *Id.* at 2202.
32. *Id.*
33. *Id.*
34. *TransUnion LLC*, 141 S. Ct. at 2202.
35. *Id.*
36. *Id.*
37. *Id.* at 2209. The parties agreed only to consider reports disseminated between January 1, 2011 and July 26, 2011, which was around the time that Mr. Ramirez received his mailings. *Id.* at 2202.
38. *TransUnion LLC*, 141 S. Ct. at 2202.
39. *Id.* (citing Ramirez v. TransUnion LLC, 951 F.3d 1008 (9th Cir. 2020)).
40. *Id.* at 2199–200.
41. *Id.* at 2204–05.
42. *Id.* at 2204 (citing Spokeo, Inc. v. Robins, 578 U.S. 330, 340–41 (2016)).

is."[43] Even if Congress has created a statutory right and cause of action, courts still must determine whether a plaintiff has suffered a concrete harm.[44]

Turning to the claim that TransUnion failed to follow reasonable procedures to assure accurate credit reports, the Court held that the 1853 class members whose reports were disseminated to third parties suffered a concrete harm comparable to the tort of defamation.[45] In contrast, the remaining 6332 plaintiffs did not suffer any injury, even though they were victims of a statutory violation.[46] The majority reasoned that there is no analog in traditional law where the existence of inaccurate information, without dissemination, amounts to concrete harm.[47] "The mere presence of an inaccuracy in an internal credit file, if it is not disclosed to a third party, causes no concrete harm."[48]

Nor was the majority convinced by the argument that these plaintiffs faced a risk of future harm that met the concreteness requirement. First, the Court held that these plaintiffs did not "factually establish a sufficient risk of future harm to support Article III standing."[49] Moreover, even if they had, injury caused by risk of future injury gives rise only to injunctive relief, not damages, which is the only relief sought in this case.[50]

The majority next addressed the claims that TransUnion's mailings did not comply with FCRA requirements.[51] Though the failure to provide a complete credit report and include a summary of rights with that report violated the statute, the Court held that it caused none of the plaintiffs actual harm.[52] Moreover, it held that this "formatting violation[]" did not bear a close relationship to a harm traditionally recognized by common law.[53]

Justice Thomas wrote a dissent, joined, in an unusual lineup, by Justices Breyer, Kagan, and Sotomayor.[54] The dissent accused the majority of ignoring history that established "the principle that the violation of an individual right gives rise to actionable harm was widespread at the founding, in early American history, and in many modern cases."[55] Here, each plaintiff showed that TransUnion violated three separate rights created by the FCRA.[56] But, "despite

43. *TransUnion LLC*, 141 S. Ct. at 2204–05 (quoting Hagy v. Demers & Adams, 882 F.3d 616, 622 (6th Cir. 2018)).
44. *Id.* at 2205.
45. *Id.* at 2209.
46. *Id.* at 22012–13.
47. *Id.* at 2209.
48. *TransUnion LLC*, 141 S. Ct. at 2210.
49. *Id.* at 2211–12.
50. *Id.* at 2210.
51. *Id.* at 2207, 2213.
52. *Id.* at 2207, 2214.
53. *TransUnion LLC*, 141 S. Ct. at 2213.
54. *Id.* at 2214.
55. *Id.* at 2218–19 (Thomas, J., dissenting).
56. *Id.* at 2218.

Congress' judgment that [TransUnion's] misdeeds deserve redress, the majority decided that TransUnion's actions were so insignificant that the Constitution prevents consumers from vindicating their rights in federal court. The Constitution does no such thing."[57] As Justice Thomas wrote, this holding marks a significant change in the law:

> Never before has this Court declared that legal injury is *inherently* insufficient to support standing. And never before has this Court declared that legislatures are constitutionally precluded from creating legal rights enforceable in federal court if those rights deviate too far from their common-law roots. According to the majority, courts alone have the power to sift and weigh harms to decide whether they merit the Federal Judiciary's attention. In the name of protecting separation of powers, . . . this Court has relieved the legislature of its power to create and define rights.[58]

Thus, this case raises questions about individuals' ability not only to raise claims under the FCRA, but also many other statutes protecting civil rights, due process, privacy, and the environment, if a court decides those statutes create rights unique to modern society without clear analogues to the harms historically recognized in common law.[59]

The question of when an injury is sufficiently concrete to give rise to standing also arose in *Trump v. New York*, which addressed whether individuals without lawful immigration status could be excluded from the U.S. census count and, therefore, disregarded when determining Congressional apportionment.[60] The Court did not reach the ultimate issue in the case, instead finding the plaintiffs did not have standing.[61] It was one of this term's several *per curiam* opinions with strong, three-justice dissents.

The requirements at issue in this case stem from the U.S. Constitution and federal law. The Constitution requires that an "enumeration" of the population, or census, take place every ten years.[62] A federal statute requires the Secretary of Commerce to take this census and to report to the President the total U.S. population by state for the apportionment of members of the House of Representatives.[63] The census also plays a role in allocating federal funds to States.[64] In July 2020, then-President Trump issued a policy that would exclude immigrants "not in a lawful status" from the apportionment count.[65] For states

57. *Id.* at 2214.
58. *Transunion LLC*, 141 S. Ct. at 2221.
59. *See* Chemerinsky, *supra* note 19, at 270.
60. Trump v. New York, 141 S. Ct. 530, 541 (2020).
61. *Id.* at 536–37.
62. *Id.* at 533 (citing U.S. CONST. art. I, § 2, cl. 3).
63. *Id.* at 534 (citing 13 U.S.C. § 141(a), (b)).
64. *Id.* at 536, 538.
65. *Trump*, 141 S. Ct. at 534 (citing 85 Fed. Reg. 44,680 (2020)).

with many resident non-citizens without legal status, the order had the potential to reduce the number of federal representatives.

Not surprisingly, several suits challenged the policy, including one by New York and a number of other states.[66] The plaintiffs argued that it would chill noncitizens and their families from responding to the census, degrading the quality of the data, forcing states to divert resources to combat the chilling effect and, ultimately, affect a range of government activities ranging from apportionment of representation to federal funding for states.[67] The District Court found that the policy violated the law governing the census and issued an injunction prohibiting the Secretary from informing the President of the number of undocumented people counted in the census.[68]

The Government appealed directly to the Supreme Court.[69] While the case was pending, the census response period ended.[70] In a *per curiam* opinion, the Court held that the case did not present a justiciable dispute, citing standing and ripeness.[71] It held that the case was "riddled with contingencies and speculation that impeded judicial review," rendering the states' claimed injuries insufficiently concrete or imminent to satisfy the injury in fact requirement.[72] The Court noted that it was not clear exactly how the Executive Branch would ultimately implement the policy of excluding noncitizens from the apportionment or that it could feasibly be implemented at all.[73] Moreover, the Court held that the impact on federal funding to the states was even less certain.[74] In the meantime, "the plaintiffs suffer no concrete harm from the challenged policy itself, which does not require them to do anything or refrain from doing anything."[75] Thus, the Court determined the process should be allowed to play itself out to see whether any injury actually occurred.[76]

Justice Breyer, joined by Justices Sotomayor and Kagan, dissented. The dissent reasoned that "[u]nder a straightforward application of our precedents," the plaintiffs have standing to sue, since the Government did not dispute that the policy would harm the plaintiff states if implemented and that it intended to implement the policy immediately if able to do so.[77] Justice Breyer noted that the policy explicitly stated that its aim was to diminish the "political influence"

66. *Id.* at 534.
67. *Id.*
68. *Id.*
69. *Id.*
70. *Trump*, 141 S. Ct. at 534.
71. *Id.* at 536.
72. *Id*. at 535–36.
73. *Id.* at 535.
74. *Id.* at 536.
75. *Trump*, 141 S. Ct. at 536 (internal quotation and citation omitted).
76. *Id.* at 536.
77. *Id.* at 537.

and "congressional representation" of states in which undocumented immigrants lived.[78] In addition, the consequence of the policy would be that states lose federal funding that is distributed on the basis of population.[79] Thus, as "the Government acknowledges it is working to achieve an allegedly illegal goal, this Court should not decline to resolve the case simply because the Government speculates that it might not fully succeed."[80] Further, the states had demonstrated "a realistic danger of sustaining a direct injury as a result" of the policy's operation and "need not await the consummation of threatened injury to obtain relief."[81]

The case ultimately became moot, as one of President Biden's first actions was to formally withdraw the Trump administration policy.[82] Moreover, the facts of the case are sufficiently idiosyncratic that the opinion may not have much jurisprudential impact. At the same time, the case is concerning for several reasons. First, as Justice Breyer observes, it is surprising that the administration could announce an explicit policy to take a certain action with the intent of inflicting harm on a plaintiff and, merely because the Court deems it unlikely that they will fully succeed, its action is insulated from judicial review until after the harm has occurred.[83] Moreover, the use of a *per curiam* opinion seems an inappropriate way to address a high-profile, controversial political issue, particularly when three justices dissent.[84]

The Court addressed the remaining two standing requirements, traceability and redressability, in other cases. First, *California v. Texas*, a 7–2 opinion by Justice Breyer, addressed the most recent challenge to the ACA.[85] Two individual plaintiffs and several states challenged the constitutionality of the ACA's mandate to purchase minimum essential coverage after Congress zeroed out the penalty.[86] The plaintiffs argued that, with no financial penalty, the mandate was no longer constitutional as a tax, and because it was inseverable from the remainder of the statute, the whole Act must fall.[87]

The Court concluded that the plaintiffs lacked standing because the alleged injuries were not "fairly traceable to the defendant's allegedly unlawful

78. *Id.* at 538.

79. *Id.* at 540.

80. *Trump*, 141 S. Ct. at 541.

81. *Id.* at 538 (internal quotation and citation omitted). The dissenting justices would also have reached the merits and affirmed the lower courts' determination that the challenged policy violated the statute governing the census and apportionment. *Id.* at 542. Relying on the statute's text, the history of its application, and legislative history, the dissent concluded that a person's immigration status is irrelevant to the question of whether they reside in a state. *Id.* at 545.

82. Exec. Order No. 13,986, 86 Fed. Reg. 7015, 7016 (2021).

83. *Trump*, 141 S. Ct. at 541.

84. *See* Robbins, *supra* note 10, at 1201–02.

85. California v. Texas, 141 S. Ct. 2104, 2110, 2112 (2021).

86. *Id.* at 2112.

87. *Id.*

conduct."[88] The Court was careful to limit its analysis to injuries traceable to the alleged *unlawful* conduct—specifically, the now-unenforceable mandate to purchase health coverage.[89] The Court repeatedly explained that standing analysis must be cabined in this way and rejected several theories of injury based on harms traceable to "other provisions of the Act."[90]

In evaluating the injuries traceable to the mandate itself, the Court concluded that neither the individual nor state plaintiffs had met their burden to demonstrate standing.[91] The Court rejected the individual plaintiffs' claims because they had already purchased insurance to comply with the mandate.[92] While the Court noted that it has historically used different language to describe the threshold for establishing that enforcement is actual or threatened—*e.g.*, "a realistic danger" or a "substantial" likelihood—there was no question the individual plaintiffs had not met this burden: they had "not pointed to any way in which defendants . . . will act to enforce" the mandate.[93]

The Court also considered the individual plaintiffs' standing from the perspective of redressability. While the plaintiffs sought injunctive relief from the effects of *other* provisions, as to the mandate, they sought only a declaratory judgment.[94] The Court emphasized that the Declaratory Judgment Act does not independently provide jurisdiction and that with "no one, and nothing, to enjoin," the judicial relief plaintiffs sought would not redress their injuries.[95]

Turning to the state plaintiffs, the Court similarly concluded that they had not satisfied their burden to show that the claimed financial injuries were traceable to the coverage mandate.[96] The Court explained that plaintiffs always have the burden to demonstrate standing, but here, the evidentiary requirement was heightened for two reasons.[97] First, the states' theory of standing turned on the actions of independent third parties, where "standing is not precluded, but . . . is ordinarily substantially more difficult to establish."[98] The states primarily relied on declarations from state officials describing various financial costs incurred due to increased enrollment in Medicaid and state employee health insurance.[99] The Court dismissed these declarations because most did not make any connection to the mandate, and those that did make a connection described

88. *Id.* at 2113 (quoting Daimler-Chrysler Corp. v. Cuno, 547 U.S. 332, 342 (2006)).

89. *See id.* at 2116-17; *see also id.* at 2121 (Thomas, J., concurring).

90. *California*, 141 S. Ct. at 2119.

91. *Id.* at 2120.

92. *See id.* at 2114.

93. *Id.* at 2114 (quoting Babbitt v. Farm Workers, 442 U.S. 289, 298 (1979) and Susan B. Anthony List v. Driehaus, 573 U.S. 149, 164 (2014)).

94. *Id.* at 2115.

95. *California*, 141 S. Ct. at 2115–16.

96. *Id.* at 2116.

97. *Id.* at 2117.

98. *Id.* (internal quotes omitted).

99. *Id.* at 2118.

consequences of the mandate when it was still enforceable.[100] With respect to Medicaid, the Court reasoned that the program "offer[s] . . . many benefits" that would entice individuals to enroll, even absent a mandate.[101] Thus, "neither logic nor intuition" supported the argument that the mandate caused the increased Medicaid enrollment of which the states complained.[102] Accordingly, the states' evidence did not fall under the line of cases permitting standing based on evidence "that third parties will likely react in predictable ways."[103]

The Court also found standing in *Collins v. Yellen*, in an opinion by Justice Alito, who authored the dissent in *California v. Texas*.[104] While the opinion in *Collins* was joined, at least in part, by six Justices (including several in the majority for *California v. Texas*),[105] the language used to define the allegedly unlawful conduct at issue in *Collins* appears at first blush to be in tension with the ACA decision. In *Collins*, shareholders in Fannie Mae and Freddie Mac brought a constitutional challenge to the Housing and Economic Recovery Act of 2008.[106] The shareholders claimed that the Recovery Act violated the separation of powers by restricting when the President could remove the director of the Federal Housing Finance Agency (FHFA).[107] Lower courts found the shareholders lacked standing because they "could not trace their injury to the Recovery Act's removal restriction."[108] The Court rejected that reasoning, stating that "for the purposes of traceability, the relevant inquiry is whether the plaintiffs' injury can be traced to the allegedly unlawful conduct of the defendant, *not to the provision of law that is challenged*."[109] The Court described the "allegedly unlawful conduct" as the director's actions amending agreements with Fannie May and Freddie Mac, which cost the shareholders money, "and because the shareholders' concrete injury flows directly from that amendment, the traceability requirement is satisfied."[110] Because, as it later concluded, the director's appointment was allegedly unlawful, and the director participated in executing the amendment that caused the shareholders' injuries, the shareholders satisfied the traceability requirement.[111]

As in *California v. Texas*, the Court's discussion of remedies in *Collins* provided further clarification to its traceability analysis. It explained that where

100. *California*, 141 S. Ct. at 2118.
101. *Id.* at 2117.
102. *Id.* at 2118.
103. *Id.* at 2117 (quoting Dep't of Com. v. New York, 139 S. Ct. 2551, 2566 (2019)).
104. Collins v. Yellen, 141 S. Ct. 1761, 1770 (2021).
105. *Id.* at 1769.
106. *Id.* at 1770.
107. *Id.*
108. *Id.* at 1779 (quoting Collins v. Mnuchin, 938 F.3d 553, 620–21 (opinion of Costa, J.)).
109. *Collins*, 141 S. Ct. at 1779 (internal quote omitted, emphasis added).
110. *Id.*
111. *Id.*

a statute impermissibly restricts the removal of an official, "any harm resulting from actions taken under" that official may be "attributable to a constitutional violation."[112] Thus, the question the Court considered when evaluating the available remedy was the precise role of the unlawfully appointed official in the action that caused the injury.[113] For instance, if the shareholders could show that "the President might have replaced one of the confirmed Directors who supervised the implementation of" the challenged amendment, or that a "[d]irector might have altered his behavior in a way that would have benefited shareholders," they could be entitled to some relief.[114] Ultimately, for the standing analysis, because "a decision in the shareholders' favor could easily lead to the award of *at least some* of the relief they seek," the injury was traceable and redressable.[115] In sum, future plaintiffs should take care to closely examine the relationship between the precise relief requested and the injuries claimed and ensure that they can establish a close connection to support standing.

In contrast to the cases in which the Court did not find standing, it arguably stretched the limits of Article III to reach the merits in *Uzuegbunam v. Preczewski*, which raised a First Amendment claim and focused on redressability.[116] Two evangelical Christian students at Georgia Gwinnett College challenged a campus policy restricting distribution of written religious materials and religious speech to two designated "free expression speech areas" on campus.[117] They sought injunctive relief and nominal damages.[118] The college abolished the policy during the litigation and moved to dismiss the suit as moot.[119] The students conceded that injunctive relief was no longer available, but contended that their claim for nominal damages kept the suit alive.[120] The District Court disagreed, dismissing the suit, and the Eleventh Circuit affirmed.[121]

The Supreme Court reversed, holding a claim for nominal damages alone satisfied Article III's standing requirements.[122] The case focused on whether nominal damages were capable of redressing a past injury—the third Article III factor.[123] The majority held that "nominal damages provide the necessary redress for a completed violation of a legal right[,]" which the plaintiffs in this

112. *Id.* at 1781.
113. *Id.* at 1762.
114. *Collins*, 141 S. Ct. at 1789.
115. *Id.* at 1779.
116. Uzuegbunam v. Preczewski, 141 S. Ct. 792, 797 (2021).
117. *Id.* at 796–97.
118. *Id.* at 797.
119. *Id.*
120. *Id.*
121. *Uzuegbunam*, 141 S. Ct. at 797.
122. *Id.* at 802.
123. *Id.* at 797–98.

case suffered.[124] While "a single dollar often cannot provide full redress, . . . the ability to effectuate a partial remedy satisfies the redressability requirement."[125]

In a sarcastic dissent, Chief Justice Roberts found "just a few problems" with the challenge—the restrictions no longer exist, the students no longer attend the college, and they never alleged actual damages.[126] He rejected the premise that nominal damages redress harm, raising the specter of courts issuing advisory opinions whenever nominal damages are alleged, thus "turning judges into advice columnists."[127] He further noted, that the Court did not reach the issue of whether a defendant should be able to end a case by giving the plaintiff the nominal damages requested, though "our cases have long suggested that he can."[128] "The scope of our jurisdiction should not depend on whether the defendant decides to fork over a buck."[129]

III. STATUTORY CONSTRUCTION

When there are questions about what a law means, people look to the courts. The courts, in turn, use rules of statutory construction to decide what the law means. Not surprisingly, this past term, the Supreme Court issued a number of opinions that apply these rules of construction.[130] A few themes emerged.

First, the Court resolved a number of statutory interpretation questions by emphasizing the importance of a statute's structure and context, not just a plain reading of the text's words. Second, as in recent years, the Court established the meaning of contested words or phrases by looking to how those terms were understood at the time Congress enacted the statute. Legislative history played a secondary role when the Court was discerning a statute's meaning. Instead, some justices factored in what they imagined Congress would have considered important when drafting a statute in a particular way. To put it another way, rather than cite evidence from Congress, these justices relied on their own speculations. And, third, borrowing words from the Honorable Judge Gladys Kessler, the Court recognized that, in addition to "the dry and bloodless language of the law," these cases "are about people."[131] In multiple cases, Justice

124. *Id.* at 802 (internal quotation marks and citation omitted).

125. *Id.* at 801 (internal quotation marks and citation omitted).

126. *Uzuegbunam*, 141 S. Ct. at 802

127. *Id.* at 803, 804.

128. *Id.* at 808.

129. *Id.*

130. *Trump*, 141 S. Ct. at 542; Niz-Chavez v. Garland, 141 S. Ct. 1474, 1482, 1486 (2021); Pereida v. Wilkinson, 141 S. Ct. 754, 768, 773 (2021); Johnson v. Guzman Chavez, 141 S. Ct. 2271, 2286, 2289 (2021); California v. Texas, 141 S. Ct. 2104, 2109, 2120 (2021); TransUnion LLC v. Ramirez, 141 S. Ct. 2190, 2204 (2021); Territory of Guam v. United States, 141 S. Ct. 1608, 1615 (2021).

131. Salazar v. Salazar v. District of Columbia, 954 F. Supp. 278, 281 (D.D.C. 1996).

Sotomayor pointed out how the Court's construction of a statute would have particular impact on low-income people and people of color.[132]

The Court's statutory interpretation cases, of course, consistently started with the text of the statute. But the Court often placed significant emphasis on the "context" or "structure" of a statute to determine its meaning. For instance, in *Niz-Chavez v. Garland*, the Court considered whether a requirement by the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA) to send an immigrant "a notice to appear" requires a single, comprehensive notice with all the required information, or whether that information could be supplied through multiple notices sent at different times.[133] The Court concluded that the statute requires a single, comprehensive notice.[134]

Justice Gorsuch, writing for the Court, started by noting the text's use of the singular article "a."[135] But despite this straightforward interpretation, the Court did not stop there. Acknowledging that sometimes "a" can refer to items provided in installments, the Court emphasized that "context matters."[136] Here, the Court found the use of "a" important because, while notice can refer either to "a countable object ('a notice,' 'three notices' *or* a noncountable abstraction ('sufficient notice,' 'proper notice')," the use of the singular in IIRIRA suggests that Congress intended notice to refer to countable objects.[137] Without evidence to suggest Congress intended some technical or other non-ordinary meaning, the Court stressed that customary and ordinary usage should govern.[138]

The next "contextual clue" the Court reviewed was the similarity between "a notice to appear" and other case-initiating pleadings.[139] The Court reasoned that the Federal Rules of Criminal and Civil Procedure that Congress adopted similarly use "the indefinite article to refer to a single document" that initiates legal proceedings, such as a complaint or indictment.[140]

Still not satisfied, the Court continued on to analyze the "structure and history" of the statute.[141] It reviewed several other related statutory provisions which referred to "the" notice to appear, which underscored that Congress intended the notice to be a single document.[142] Finally, the Court relied on the history of the statute, noting that a prior version allowed the government to

132. *Pereida*, 141 S. Ct. at 767; *Johnson*, 141 S. Ct. at 2293.
133. *Niz-Chavez*, 141 S. Ct. at 1478.
134. *Id.* at 1486.
135. *Id.* at 1481.
136. *Id.*
137. *Id.*
138. *Niz-Chavez*, 141 S. Ct. at 1481–82.
139. *Id.* at 1482.
140. *Id.*
141. *Id.*
142. *Id.* at 1482–83.

provide the necessary information in the written document "or otherwise."[143] The Court's interpretation gave meaning to this change: now, the required information must be in "a notice to appear" and not provided "otherwise."[144] The Court did not go so far as to cite legislative history, but did reason that "[a] rational Congress easily could have thought that measuring an [immigrant]'s period of residence against the service date of a discrete document was preferable to trying to measure it against a constellation of moving pieces."[145]

The Court followed a similar pattern of review in *Tanzin v. Tanvir*.[146] This case arose after FBI agents placed Muhammad Tanvir and other practicing Muslims on a No Fly List.[147] Mr. Tanvir and the others sued, alleging that the agents violated the Religious Freedom Restoration Act of 1993 (RFRA) by placing them on the No Fly List because they had refused to be informants against their religious communities.[148] The complaint sued the agents in their official capacities for injunctive relief and in their individual capacities for money damages.[149] The Department of Homeland Security subsequently removed Mr. Tanvir and the others from the No Fly List.[150] The case for damages continued, however, making its way to the Supreme Court.[151] Using rules of construction, the Court unanimously held that relief for violations of RFRA includes claims for money damages against government officials in their individual capacities.[152]

RFRA authorizes individuals to "obtain appropriate relief against a government."[153] The Government argued that this phrase should be limited to suits against individuals in their official capacity as a government actor.[154] The Court pointed out that "[t]he problem with this otherwise plausible argument is

143. *Niz-Chavez*, 141 S. Ct. 1484.

144. *Id.*

145. *Id.* at 1484. A majority of the Court decided against noncitizens in other cases involving statutory interpretation of the Immigration and Nationality Act. *See* Pereida v. Wilkinson, 141 S. Ct. 754, 761 (2021) (applying rules of construction to conclude that Immigration and Nationality Act provisions place the burden of proof on the noncitizen to prove they have not been convicted of disqualifying crimes, including crimes of moral turpitude); Johnson v. Guzman, 141 S. Ct. 2271, 2280, 2291 (2021) (applying rules of construction to conclude that Immigration and Nationality Act provisions categorically deny bond hearings to noncitizens who are detained after reentering the U.S. and are now challenging their removal based on a reasonable fear of persecution or torture). Justices Breyer, Sotomayor, and Kagan dissented in both cases.

146. Tanzin v. Tanvir, 141 S. Ct. 486, 493 (2020) (showing a similar analysis using rules of construction).

147. *Id*. at 489.

148. *Id*.

149. *Id*.

150. *Id*.

151. *Tanzin*, 141 S. Ct. at 489.

152. *Id*. at 493, *aff'g*, 894 F.3d 449 (2d Cir. 2018).

153. *Id*. at 489 (quoting 42 U.S.C. § 2000bb-1(c)).

154. *Id*. at 490.

that Congress supplanted the ordinary meaning of 'government' with a different, express definition."[155] RFRA defines "government" to include "a branch, department, agency, instrumentality, and *official* (*or other person acting under color of law*) of the United States."[156] And, "[w]hen a statute includes an explicit definition, we must follow that definition, even if it varies from a term's ordinary meaning. . . ."[157]

The opinion also assessed the "legal backdrop" against which Congress enacted RFRA.[158] Another civil rights statute, 42 U.S.C. § 1983, applies to "person[s] . . . under color of any statute" and has long been interpreted to allow suits against government officials in their individual capacities.[159] Writing for the Court, Justice Thomas reasoned, "Because RFRA uses the same terminology as § 1983 in the very same field of civil rights law, 'it is reasonable to believe that the terminology bears a consistent meaning.'"[160]

The Court then parsed the meaning of "appropriate relief" under RFRA.[161] Lacking a statutory definition, the Court sought out "the phrase's plain meaning at the time of enactment."[162] Dictionaries of the time defined the word similarly as meaning "especially suitable"—an open-ended definition that the Court recognized would be "inherently context dependent."[163] Justice Thomas noted that damages were awarded against government officials "[i]n the early Republic."[164] He then said RFRA was passed to "counter" the Court's decision in *Employment Division v. Smith*,[165] and make clear that the Government must

155. *Id*.

156. *Tanzin*, 141 S. Ct. at 489 (quoting 42 U.S.C. § 2000bb–2(1) (emphasis in original).

157. *Id*. at 490 (internal quotations omitted). In *Van Buren v. United States*, 141 S. Ct. 1648 (2021), both the six-member majority and the three dissenting justices relied on many of the same sources to reach opposite conclusions. For example, both cited A. Scalia & B. Garner, READING LAW: THE INTERPRETATION OF LEGAL TEXTS, and both sides cited *Tanzin*. Van Buren, 141 S. Ct. at 1657, 1663. The justices also engaged in a dictionary face-off, with the majority citing from eight dictionaries, WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY, OXFORD ENGLISH DICTIONARY, BLACK'S LAW DICTIONARY, RANDOM HOUSE DICTIONARY, COMPUTER DICTIONARY AND HANDBOOK, BARNHART DICTIONARY OF NEW ENGLISH, MICROSOFT COMPUTER DICTIONARY, and A DICTIONARY OF COMPUTING, *id.* at 1654–58, and the dissent, from two, THE AMERICAN HERITAGE DICTIONARY AND BLACK'S LAW DICTIONARY, *id.* at 1663 (Thomas, J., Roberts, C.J., Alito, J., dissenting).

158. *Tanzin*, 141 S. Ct. at 490.

159. *Id*. at 490 (citing Memphis Cmty. Sch. Dist. v. Stachura, 477 U.S. 299, 305–06, and n. 8 (1986)).

160. *Id*. at 490–91(citing A. SCALIA & B. GARNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS 323 (2012) (internal quotations omitted).

161. *Id*. at 491.

162. *Id.*

163. *Tanzin*, 141 S. Ct. at 491.

164. *Id*. (citation omitted).

165. *Id.* at 489 (citing Emp. Div., Dept. of Hum. Res. of Or. V. Smith, 494 U.S. 872, 885–90 (1990)) ("[T]he First Amendment tolerates neutral, generally applicable laws that burden or

have a "compelling interest" when its actions "substantially burden" a person's exercise of religion.[166] Because RFRA had reinstated the pre-*Smith* protections, it stood to reason that persons suing under RFRA "must have at least the same avenues for relief against officials that they would have had before *Smith*. That means RFRA provides, as one avenue for relief, a right to seek damages against Government employees."[167] Justice Thomas concluded:

> Our task is simply to interpret the law as an ordinary person would. Although background presumptions can inform the understanding of a word or phrase, those presumptions must exist at the time of enactment. We cannot manufacture a new presumption now and retroactively impose it on a Congress that acted 27 years ago.[168]

Facebook, Inc. v. Duguid applied the same—and many other—rules of construction.[169] In fact, *Facebook* offers a mini-treatise on these rules.[170] The case was sparked by an optional Facebook security feature that sends text alerts when an unknown device attempts to access the user's Facebook account.[171] Noah Duguid received the alerts even though he had not opted into the service.[172] Unable to stop them, he filed a lawsuit alleging that Facebook was violating a provision of the Telephone Consumer Protection Act (TCPA) that prohibits the use of autodialer systems.[173] The TCPA defines an autodialer as:

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prohibit religious acts even when the laws are unsupported by a narrowly tailored, compelling governmental interest[.]"). For additional discussion of *Smith*, *see infra* Section IV.B.1 and accompanying notes.

166. *Tanzin*, 141 S. Ct. at 489 (quoting 42 U.S.C. § 2000bb(b)(1)–(2)).

167. *Id*. at 492.

168. *Id.* at 493. Justice Thomas and three other Justices took the opportunity in two non-majority opinions to reiterate their belief in cabining statutory interpretation to the time of enactment, particularly when considering how statutes relate to common law. In *Nestlé USA, Inc. v. Doe*, the Court addressed what torts may be brought under the Alien Tort Statute (ATS). Nestlé USA, Inc. v. Doe, 141 S. Ct. 1931, 1941 (2021). While the ATS creates jurisdiction for "torts . . . in violation of the law of nations," Justices Gorsuch, Thomas, and Kavanaugh wrote separately to emphasize that they would limit the available torts to three that were recognized as violations of international law at the time the ATS was enacted in 1789, regardless of how international law develops over time. *Id.* at 1941–42 (Gorsuch, J., concurring). In *Minerva Surgical, Inc. v. Hologic, Inc*., Justice Barret, writing for the dissent, rejected the application of the canon that Congress legislates against a backdrop of common-law principles. Minerva Surgical, Inc. v. Hologic, Inc., 141 S. Ct. 2298, 2314 (2021). In her view, Congress cannot ratify common-law principles unless the principles are "well-settled" when the statute is enacted. *Id.* at 2314–15. Because the doctrine at issue was introduced only "in the late 19th century," unlike others which "have been around for nearly a thousand years," she reasoned, Congress could not have intended to incorporate the doctrine. *Id.* at 2319–20.

169. Facebook, Inc. v. Duguid, 141 S. Ct. 1163, 1169 (2021).

170. *Id.*

171. *Id.* at 1168.

172. *Id.*

173. *Id.*

> "[E]quipment which has the capacity—
>
> (A) to store or produce telephone numbers to be called, using a random or sequential number generator; and
>
> (B) to dial such numbers."[174]

The Court had to decide whether the clause "using a random or sequential number generator" modifies both verbs that precede it ("store" and "produce") or only the verb nearest to it ("produce").[175] Justice Sotomayor's opinion for the Court employs numerous rules of construction to decide the question, including:

- Plain text meaning: The Court notes that the clause "hangs together as a unified whole, . . . using the word 'or' to connect two verbs that share a common direct object, 'telephone numbers to be called.'" Reading the text to apply the modifier ("using a random or sequential number generator") to just part of the "cohesive preceding clause" would be "odd."[176]
- The commands of punctuation: "A qualifying phrase ["using a random or sequential number generator"] separated from antecedents ["store or produce"] by a comma is evidence that the qualifier is supposed to apply to all the antecedents instead of only to the immediately preceding one."[177]
- The series-qualifier canon: "'When there is a straightforward, parallel construction that involves all nouns or verbs in a series,' a modifier at the end of the list normally applies to the entire series."[178] While the Court agreed that the autodialer definition followed this structure, Justice Alito's concurrence notes the limits of this canon: "[C]anons are useful tools, but it is important to keep their limitations in mind. This may be especially true with respect to. . . the 'series-qualifier' canon."[179]

174. *Facebook, Inc.*, 141 S. Ct. at 1169 (quoting 47 U.S.C. § 227(a)(1)).

175. *Id.*

176. *Id*.

177. *Id*. at 1170 (collecting treatises).

178. *Id*. at 1169 (collecting cases and citing A. SCALIA & B. GARNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS 147 (2012)).

179. *Facebook, Inc.*, 141 S. Ct. at 1173–74 (Alito, J., concurring) ("Perhaps more than most of the other canons, [the series qualifier canon] is highly sensitive to context. Often the sense of the matter prevails: He went forth and wept bitterly does not suggest that he went forth bitterly.") (internal quotations and citation omitted). Justice Alito provided additional examples, *e.g.*: "On Saturday, he relaxes and exercises vigorously." "When his owner comes home, the dog wags his tail and barks loudly." "She likes to swim and run wearing track spikes." *Id.* at 1174. *See also* Yellen v. Confederated Tribes, 141 S. Ct. 2434, 2448 (2021) (citing J. Alito's *Facebook, Inc.* concurrence and refusing to apply series-qualifier canon); *id.* at 2454 (Gorsuch, J., Thomas, J., & Kagan, J., dissenting) (citing *Facebook*, 141 S. Ct. at 1170, and applying series-qualifier canon, stating "[a] clause that leaps over its nearest referent to modify every other term would defy grammatical gravity and common sense alike.").

- The rule of the last antecedent: "[A] limiting clause or phrase . . . should ordinarily be read as modifying only the noun or phrase that it immediately follows." The Court refused Duguid's arguments to use this canon, finding that it does not apply when, as in this case, the modifying clause appears after an integrated list.[180] At any rate, application of the rule did not help Duguid: "The last antecedent before 'using a random or sequential number generator' is not 'produce,' as Duguid needs it to be, but rather 'telephone numbers to be called.' There is 'no grammatical basis,' for arbitrarily stretching the modifier back to include 'produce,' but not so far back as to include 'store.'"[181]
- The distributive canon: "'Where a sentence contains several antecedents and several consequents,' courts should 'read them distributively and apply the words to the subjects which, by context, they seem most properly to relate.'"[182] The Court also refused to apply this canon noting that there are two antecedents (store and produce) but only one consequent modifier (using a random or sequential number generator), and "'the distributive canon has the most force when the statute allows for one-to-one matching.'"[183]
- Duguid's arguments were also rejected because application of the traditional rules of interpretation did not result in a "'linguistically impossible' or contextually implausible outcome."[184]
- Finally, "statutory context" confirmed the Court's reasoning.[185] The TCPA makes it unlawful to use an autodialer to call certain emergency telephone numbers.[186] "Expanding the definition of an autodialer to encompass any equipment that merely stores and dials telephone numbers would take a chainsaw to these nuanced problems when Congress meant to use a scalpel."[187]

Because Facebook's alert system did not store or produce telephone numbers "using a random or sequential number generator," it was not an autodialer.[188] Mr. Duguid lost his case.[189]

180. *Facebook, Inc.*, 141 S. Ct. at 1170 (quoting Barnhart v. Thomas, 540 U.S. 20, 26 (2003)) (collecting cases).

181. *Id*.

182. *Id*. at 1172 (citation omitted).

183. *Id.* (citing Encino Motorcars, LLC v. Navarro, 138 S. Ct. 1134, 1141 (2018)).

184. *Id*. at 1171 (citing *Encino Motorcars*, 138 S. Ct. at 1141 and Advoc. Health Care Network v. Stapleton, 137 S. Ct. 1652, 1661 (2017)) ("noting that a 'sense of inconceivability' might 'urg[e] readers to discard usual rules of interpreting text[.]'").

185. *Facebook, Inc.*, 141 S. Ct. at 1171.

186. *Id*. (citing 47 U.S.C. § 227(b)(1)).

187. *Id.*

188. *Id.* at 1173.

189. *Id.*

In two other cases, the Court considered statutory provisions with ambiguous references. In each case the parties disputed whether the "natural referent" of the contested provision was internal to the same statute or encompassed other applicable law.[190] In each case, the Court emphasized the statute's context and structure, unanimously concluding that the natural referents were internal to the same statute, rejecting broader readings that created ambiguity the Court concluded Congress would not have intended.[191]

In *U.S. v. Briggs*, the Court applied rules of statutory construction to a statute of limitation for criminal prosecution under the Uniform Code of Military Justice (UCMJ).[192] The UCMJ orders the crime of rape to be "punished by death" and establishes that crimes that are punishable by death can be tried "at any time without limitation."[193] Before Briggs committed his crime, the Supreme Court had decided in *Coker v. Georgia* that the Eighth Amendment forbids punishment by death for rape.[194] Thus, Briggs urged that his crime was not, in fact "punishable" by death under all applicable law.[195] And as a result, he urged that the UCMJ's five-year statute of limitation applied.[196]

The Court disagreed.[197] While it started, as it usually does, with the text and dictionary definitions, it found this approach ultimately "shed little light on the dispute."[198] Instead, the Court emphasized the rule that "the meaning of a statement often turns on the context in which it is made," and ultimately concluded that in this case "context is determinative."[199]

The context the Court found relevant was that the contested phrase ("punishable by death") appeared within a statute of limitations provision within the UCMJ.[200] First, the Court noted the UCMJ is "uniform," making the statute itself the natural referent for the phrase "punishable by death," rather than all applicable law.[201] Second, the Court relied on the rule of interpretation that statutes of limitation should provide clarity and predictability, and thus it is "reasonable to presume that clarity is an objective for which lawmakers strive when enacting such provisions."[202] The Court explained that it had never decided whether *Coker* applies to the military, and it rejected the idea that Congress would enact a statute of limitation provision that relied on "the answer

190. United States v. Briggs, 141 S. Ct. 467, 470 (2020).
191. Territory of Guam v. United States, 141 S. Ct. 1608, 1613 (2021).
192. *Briggs*, 141 S. Ct. at 470.
193. *Id.* at 469–70.
194. *Id.* (citing Coker v. Georgia, 433 U.S. 584 (1977)).
195. *Id.* at 470.
196. *Id.*
197. *Briggs*, 141 S. Ct. at 474.
198. *Id.* at 470.
199. *Id.*
200. *Id.*
201. *Id.*
202. *Briggs*, 141 S. Ct. at 471.

to an unresolved constitutional question."[203] Third, without citing any legislative history or other authority, the Court hypothesized that "the factors that lawmakers are likely to take into account when fixing the statute of limitations for a crime differ significantly from the considerations that underlie [the Court's] Eighth Amendment decisions."[204] Thus, it found it "unlikely" that Congress intended to tie the statute of limitations to evolving Eighth Amendment precedents.[205]

In *Territory of Guam v. United States*, the Court addressed the scope of a provision establishing claims for contribution within the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA).[206] It held that these CERCLA contribution claims can only stem from "CERCLA-specific liability" and not "a broader array of settlements involving environmental liability."[207] As in *Briggs*, it focused heavily on the context of the provision within the statute as a whole, noting that this approach was reinforced by the inclusion of the word "Comprehensive" in the title of the statute.[208] Further mirroring the reasoning in *Briggs*, the Court noted that its interpretation "has the additional benefit of providing clarity for the three-year statute of limitations" associated with CERCLA contribution claims.[209] Finally, the Court found the structure of the statute and location of the contested provision within that structure sufficiently clear that it rejected application of the rule against surplusage, noting that the provision was better understood as a "sort of belt-and-suspenders approach."[210]

In the last two statutory interpretation cases we discuss, *City of Chicago v. Fulton* and *Terry v. United States*, concurrences from Justice Sotomayor remind us that real people are affected by the Court's application of the rules of construction.[211] In *City of Chicago v. Fulton,* the respondents had filed Chapter 13 bankruptcy petitions and asked the City to return their vehicles, which had been impounded for unpaid fines.[212] The City refused.[213] Litigation ensured, and the appellate court eventually held the City was violating the Bankruptcy Code.[214] The Supreme Court disagreed.[215]

203. *Id.*
204. *Id.* at 473.
205. *Id.*
206. Territory of Guam v. United States, 141 S. Ct. at 1608, 1612 (2021).
207. *Id.* at 1611.
208. *Id.* at 1613.
209. *Id.* at 1614 n.4 (internal quotes omitted).
210. *Id.* at 1615.
211. City of Chicago v. Fulton, 141 S. Ct. 585, 593 (2021); Terry v. United States, 141 S. Ct. 1858, 1864 (2021).
212. *City of Chicago*, 141 S. Ct. at 589.
213. *Id.*
214. *Id.*
215. *Id*. at 592.

Once bankruptcy is declared, section 362(a)(3) of the Bankruptcy Code prohibits "any act to obtain possession of property . . . or to exercise control over property" of the bankruptcy estate.[216] The question before the Court was whether this provision is violated when an entity simply retains possession of a debtor's property.[217]

Writing for the Court, Justice Alito first applied a "natural reading" of the provision's words, citing Black's Law Dictionary and Webster's New International Dictionary definitions to conclude that engaging in an "act" to "exercise" power "communicates more than merely 'having' that power."[218] Next, he assessed the statutory context. Another provision, § 542(a), governs "[t]urnover of property to the estate."[219] Reading § 362(a)(3) to cover mere retention of property would make § 542(a) superfluous, thus violating the canon against surplusage, which "is strongest when an interpretation would render superfluous another part of the same statutory scheme.'"[220] Finally, the Court examined the history of the Bankruptcy Code.[221] The provisions under scrutiny were included in the original Bankruptcy Code; however, § 362(a)(3) only applied to acts to obtain possession of estate property.[222] The phrase "or to exercise control over property of the estate" was not added until 1984.[223] The Court reasoned that transforming § 362 into an affirmative turnover obligation would have been an important change, "odd for Congress to accomplish . . . by simply adding the phrase "exercise control. . . . [T]he least one would expect would be a cross-reference" to § 542(a).[224] Thus, the city could retain possession of the debtor's cars.[225]

Justice Sotomayor's concurrence points out that the wording of the Code—and thus the Court's opinion—particularly disadvantaged low-income people.[226] As she explains, for a Chapter 13 bankruptcy to succeed, a debtor needs to be able to make a "fresh start," and a car can be essential to gaining and maintaining the employment needed to do that.[227] However, with the Bankruptcy Code reading as it does,

216. 11 U.S.C. § 362(a)(3).
217. *City of Chicago*, 141 S. Ct. at 589–90.
218. *Id.* at 590.
219. *Id*. at 591 (quoting 11 U.S.C. § 542).
220. *Id*. at 591 (quoting Yates v. United States, 574 U.S. 528, 543 (2015)).
221. *Id.*
222. *City of Chicago*, 141 S. Ct. at 591 (citing Bankruptcy Reform Act of 1978, 92 Stat. 2570, 2595).
223. *Id.*
224. *Id.* at 592.
225. *Id.* at 593.
226. *Id.* (Sotomayor, J., concurring).
227. *City of Chicago*, 141 S. Ct. at 593 (Sotomayor, J., concurring).

> [d]rivers in low-income communities across the country face . . . vicious cycles. A driver is assessed a fine she cannot immediately pay; the balance balloons as late fees accrue; the local government seizes the driver's vehicle, adding impounding and storage fees to the growing debt; and the driver, now without reliable transportation to and from work, finds it all but impossible to repay her debt and recover her vehicle.[228]

Justice Sotomayor calls on policy makers to take steps to ensure prompt resolution of debtors' requests for turnover under § 542(a), especially where their vehicles are concerned.[229]

Terry v. United States, was also based on a plain text approach to reading this statute, with the Court again citing Black's Law Dictionary.[230] The Court rejected Mr. Terry's bid for resentencing after a federal law had triggered changes in sentencing guidelines for possession of crack and powder cocaine.[231] Justice Sotomayor again wrote separately to emphasize the consequences of the Court's decision:

> As enacted in 1986, [the sentencing law, 21 U.S.C.] § 841(b) created a 100-to-1 ratio between the amounts of powder and crack cocaine necessary to trigger the mandatory minimums[.] . . . Subparagraph (A)'s 10-year minimum was triggered by 5,000 grams of powder cocaine (about the weight of a gallon of paint), but only 50 grams of crack cocaine (about half a stick of butter). Subparagraph (B)'s 5-year minimum required 500 grams of powder (heavier than a football) but just five grams of crack (the weight of a nickel).[232]

She noted that these sentencing laws have resulted in crack cocaine sentences that are about fifty percent longer than those for powder cocaine.[233] The concurrence continued:

> Black people bore the brunt of this disparity. Around 80 to 90 percent of those convicted of crack offenses between 1992 and 2006 were Black, while Black people made up only around 30 percent of powder cocaine offenders in those same years.[234]

Justice Sotomayor again asked Congress to address the disparity.[235]

228. *Id*. (Sotomayor, J., concurring).
229. *Id*. at 595 (Sotomayor, J., concurring).
230. Terry v. United States, 141 S. Ct. 1858, 1862 (2021).
231. *Id.* 1861–62.
232. *Id.* at 1865 (Sotomayor, J., concurring).
233. *Id*. (Sotomayor, J., concurring).
234. *Id*. (Sotomayor, J., concurring) (citation omitted).
235. *Terry*, 141 S. Ct. 1858 at 1868 (Sotomayor, J., concurring).

IV. FIRST AMENDMENT CASES

A. Challenges to COVID Restrictions

The Court heard an unusual number of cases this term involving First Amendment claims, including several challenges to state COVID restrictions. These built off a case from last term's shadow docket, *South Bay United Pentecostal Church v. Newsom ("South Bay I")*, where a *per curiam* opinion denied injunctive relief to a church that challenged California's stay-at-home order limiting attendance at places of worship.[236] In that case, Justice Roberts wrote a separate concurrence noting that "[t]he precise question of when restrictions on particular social activities should be lifted during the pandemic is a dynamic and fact-intensive matter subject to reasonable disagreement," but emphasized that latitude was owed public health officials when they "act in areas fraught with medical and scientific uncertainties."[237] Justices Kavanaugh, Thomas, and Gorsuch dissented, stating that they would have applied strict scrutiny to California's order, and in their view, the state had failed to provide a "compelling justification" for its limitations on religious activity.[238]

The Court initially continued the trend upholding state COVID restrictions this term, when, in July 2020 in *Calvary Chapel Dayton Valley v. Sisolak*, the Court *per curiam* denied an injunction challenging a state's COVID restrictions as an infringement on First Amendment Free Exercise and Free Speech rights.[239] Justices Kavanaugh, Thomas, and Gorsuch again dissented, this time joined by Justice Alito.[240] Justice Alito explained his evolving approach:

> [A]t the outset of an emergency, it may be appropriate for courts to tolerate very blunt rules. In general, that is what has happened thus far during the COVID-19 pandemic. But a public health emergency does not give Governors and other public officials carte blanche to disregard the Constitution for as long as the medical problem persists. As more medical and scientific evidence becomes available, and as States have time to craft policies in light of that evidence, courts should expect policies that more carefully account for constitutional rights.[241]

By November 2020, the tide began to turn. *Roman Catholic Diocese of Brooklyn v. Cuomo* was a *per curiam* decision addressing a consolidated set of cases by religious organizations against the State of New York, challenging the Governor's Executive Order on COVID restrictions, which limited in-person

236. S. Bay United Pentecostal Church v. Newsom (*South Bay I*), 140 S. Ct. 1613, 1613–14 (2020).

237. *Id.* at 1613 (Roberts, C.J., concurring) (quoting Marshall v. United States, 414 U.S. 417, 427 (1974)).

238. *Id.* at 1614–15 (Kavanaugh, J., dissenting).

239. Calvary Chapel Dayton Valley v. Sisolak, 140 S. Ct. 2603, 2603, 2605 (2020).

240. *Id.* at 2603 (Alito, J., dissenting); *id.* at 2609 (Gorsuch, J., dissenting); *id.* (Kavanaugh, J., dissenting).

241. *Id.* at 2605 (Alito, J., dissenting).

attendance at religious services in areas where the risk of transmission was deemed especially high.[242] The Court found that the Executive Order's provisions "cannot be viewed as neutral because they single out houses of worship for especially harsh treatment."[243] As such, the Court applied strict scrutiny review and determined that "[s]temming the spread of COVID–19 is unquestionably a compelling interest" but that New York's Executive Order was "far more restrictive than any COVID–related regulations that have previously come before the Court, much tighter than those adopted by many other jurisdictions hard-hit by the pandemic, and far more severe than has been shown to be required to prevent the spread of the virus at the applicants' services," such that it likely violated the Free Exercise Clause of the First Amendment.[244] The Chief Justice dissented.[245] Justice Breyer also wrote a dissenting opinion, joined by Justices Sotomayor and Kagan, emphasizing that an injunction is an "extraordinary remedy" not warranted in the case.[246] Justice Sotomayor also penned a dissent, joined by Justice Kagan, taking issue with the Court's decision to treat the New York Executive Order as singling out houses of worship, since the Order did so in order to treat them more preferentially.[247]

A few months later, in *South Bay United Pentecostal Church v. Newsom ("South Bay II")*, the Court, in a short and non-detailed *per curiam* opinion, issued a partial injunction against California's COVID restrictions on indoor services in houses of worship, which included a twenty-five percent capacity limitation on indoor worship services in counties with the highest numbers of COVID cases, and a prohibition on chanting and singing during indoor worship services.[248] While the opinion itself is only one paragraph, it spawned several pages of signed responses by the Justices.[249] Justice Alito stated he would have granted the injunction with a stay to lift after thirty days "unless the State demonstrates clearly that nothing short of those measures will reduce the community spread of COVID–19 at indoor religious gatherings to the same

242. Roman Catholic Diocese of Brooklyn v. Cuomo, 141 S. Ct. 63, 65–66 (2020).

243. *Id.* at 66.

244. *Id.* at 67 (internal citation omitted). The Court also found that although areas where the religious organizations held their services had been reclassified since the litigation commenced such that they were no longer subject to the restrictions at issue, reclassification did not render the case moot, because the governor frequently reclassified areas with little notice. *Id.* at 68. The Chief Justice dissented on this point, stating that he found the injunctions unnecessary, given that none of the religious entities involved in the lawsuit were currently subject to restrictions. *Id*. at 75 (Roberts, C.J., dissenting).

245. Roman Catholic Diocese of Brooklyn, 141 S. Ct. at 75 (Roberts, C.J., dissenting).

246. *Id.* at 77 (Breyer, J., dissenting) (quoting Nken v. Holder, 556 U.S. 418, 428 (2009)).

247. *Id.* at 80 (Sotomayor, J., dissenting).

248. S. Bay United Pentecostal Church v. Newsom (*South Bay II*), 141 S. Ct. 716, 716 (2021).

249. *Id.* at 716–23.

extent as do the restrictions the State enforces with respect to other activities it classifies as essential."[250]

The Chief Justice issued a concurring opinion, emphasizing that while federal courts should give great deference to public health officials, the determination by California public health officials "that the maximum number of adherents who can safely worship in the most cavernous cathedral is zero … appears to reflect not expertise or discretion, but instead insufficient appreciation or consideration of the interests at stake."[251] Several justices commented specifically on California's ban on singing. Justice Barrett wrote a partial concurrence, joined by Justice Kavanaugh, expressing doubt that California had adequately carried its burden to show that its ban on singing in houses of worship was narrowly tailored.[252] Justice Gorsuch issued a statement, joined by Justices Thomas and Alito, expressing that California's restrictions "fail strict scrutiny and violate the Constitution."[253] Justice Gorsuch took issue with the Court's denial of an injunction on California's ban on singing at worship services, noting that the state had issued an exemption on the singing ban for the entertainment industry.[254] Finally, Justice Kagan dissented, joined by Justices Breyer and Sotomayor, expressing belief that California's law did not treat houses of worship differently than similarly situated secular activities, and thus should pass constitutional muster in light of the public health concerns at stake, stating: "In forcing California to ignore its experts' scientific findings, the Court impairs the State's effort to address a public health emergency."[255]

Subsequently, in *Tandon v. Newsom*, the Court *per curiam* granted an application for an injunction preventing the State of California from enforcing its guidance for allowable activities during the COVID-19 pandemic against plaintiffs who wished to gather for at-home religious exercise.[256] Following *Cuomo*, the Court held that California's "regulations are not neutral and generally applicable, and therefore trigger strict scrutiny under the Free Exercise Clause," because they contained numerous exceptions and exemptions, some specific to houses of worship.[257] The Court emphasized that California had the burden of showing that its regulations satisfied strict scrutiny, which required "show[ing] that measures less restrictive of the First Amendment activity could not address its interest in reducing the spread of COVID," and held that California was unlikely to meet its burden.[258] Finally, the Court held that the fact

250. *Id.* at 716 (statement of J. Alito).
251. *Id.* at 717 (Roberts, C.J., concurring).
252. *Id.* (Barrett, J., concurring in part).
253. *South Bay II*, 141 S. Ct at 719 (Statement of J. Gorsuch).
254. *Id.* at 719–20 (Statement of J. Gorsuch).
255. *Id.* at 722–23 (Kagan, J., dissenting).
256. Tandon v. Newsom, 141 S. Ct. 1294, 1296 (2021).
257. *Id.* (citing Roman Catholic Diocese of Brooklyn v. Cuomo, 141 S. Ct. 63, 67–68 (2020)).
258. *Id.* at 1296–97.

that California had already modified the regulation at issue did not render the case moot, since the State could easily impose the same restrictions again.[259] The Court noted sharply that this case represented the fifth time that it had overturned the Ninth Circuit's refusal to enjoin California's COVID restrictions on religious exercise, and reminded the Ninth Circuit that strict scrutiny "really means what it says."[260] Justice Kagan dissented in an opinion joined by Justices Breyer and Sotomayor, writing that the majority "disregard[ed] law and facts alike" since California's regulations treated religious and secular conduct equally, consistent with the First Amendment, and the factual record supported California's contention that at-home religious gatherings posed a greater public health risk than the commercial activity it allowed.[261]

Taken together, this line of cases suggests that by November 2020, the Court's conservative bloc—Justices Alito, Barrett, Gorsuch, Kavanaugh, and Thomas—agreed that most state COVID restrictions that specifically limit religious activity are subject to strict scrutiny and violate the Constitution.[262] It appears Justices Alito and Barrett were more willing to defer to states' judgment in the early months of the pandemic, but now agree with the other conservative Justices that states must narrowly tailor their limitations to survive a First Amendment challenge—and it is not clear whether the Court will find any limitation that restricts religious activity narrowly tailored.[263] The Chief Justice seems to consider these cases on more of a case-by-case basis and tends to defer to the judgment of state health officials as to what restrictions are necessary at various stages of the pandemic.[264] The Court's liberal Justices—Breyer, Kagan, and Sotomayor—disagree that strict scrutiny is the correct standard for review in most of these cases, finding most state restrictions do not single out religious activity and treat it more restrictively.[265] Given the ongoing pandemic and state attempts to impose restrictions to minimize infection and serious disease, we can expect that the Court will continue to revisit these questions and develop its First Amendment jurisprudence in this context in the next term.

259. *Id.* at 1297.

260. *Id.* at 1297–98 (citations omitted).

261. *Tandon*, 141 S. Ct. at 1299 (Kagan, J., dissenting).

262. *Id.* at 1298; S. Bay United Pentecostal Church v. Newsom (*South Bay II*), 141 S. Ct. 716, 718 (2021); *Roman Catholic Diocese of Brooklyn*, 141 S. Ct. at 70.

263. *See, e.g.*, Calvary Chapel Dayton Valley v. Sisolak, 140 S. Ct. 2603, 2605 (2020) (Alito, J., dissenting); *South Bay II*, 141 S. Ct. at 717 (Barrett, J., concurring in part).

264. *South Bay I*, 140 S. Ct. at 1613; *Roman Catholic Diocese of Brooklyn*, 141 S. Ct. at 75; *South Bay II*, 141 S. Ct. at 717–18 (Roberts, C.J., concurring).

265. *See, e.g.*, *Roman Catholic Diocese of Brooklyn*, 141 S. Ct. at 80 (Sotomayor, J., dissenting); *Tandon*, 141 S. Ct. at 1299 (Kagan, J., dissenting).

B. Other First Amendment Cases

The Court's disagreements about the correct standard of review for First Amendment challenges also arose in other First Amendment cases this term. For example, *Americans for Prosperity Foundation v. Bonta* was a set of consolidated cases bought by two California charities against the State of California.[266] The charities challenged a California regulation requiring charitable organizations to disclose the identities of their major donors to the State Attorney General's Office by filing with the Attorney General an attachment to their federal tax filings.[267] The regulation also required charities to register with the Attorney General and renew their registrations annually.[268] Both organizations refused to provide information about their major donors, and in 2012 and 2013, the Attorney General threatened to stop renewing their registrations and levy fines against them.[269]

The organizations sued, claiming that the regulation facially and as applied to their organizations violated the First Amendment Free Association rights and those of their major donors.[270] A six-member majority of the Court, in an opinion written by the Chief Justice, held that the California regulation was unconstitutional.[271] The Chief Justice, however, was not able to garner a majority as to the appropriate standard of review for claims of First Amendment violations involving government disclosure regimes; the plurality (Roberts, Kavanaugh, and Barrett) affirmed that the standard of review is one of "exacting scrutiny," which evaluates whether "the strength of the governmental interest . . . reflect[s] the seriousness of the actual burden on First Amendment rights."[272] For such cases, the plurality asserted that this standard requires "that disclosure regimes . . . be narrowly tailored to the government's asserted interest."[273]

Justices Thomas, while agreeing that the California regulation constituted a First Amendment violation, explained in his concurring opinion that he disagreed with the plurality's formulation of the test, noting that "the bulk of 'our precedents . . . require application of strict scrutiny to laws that compel disclosure of protected First Amendment association.'"[274] Justices Alito and Gorsuch, however, refused to weigh in on the question of the standard that should apply in these cases, noting that "the choice between exacting and strict scrutiny has no effect on the decision in these cases," thus finding "no need to

266. Americans for Prosperity Found. v. Bonta, 141 S. Ct. 2373, 2379 (2021).
267. *Id.* at 2379–80.
268. CAL. CODE REGS. tit. 11, § 301 (2021).
269. *Bonta*, 141 S. Ct. at 2380.
270. *Id.*
271. *Id.* at 2385, 2389.
272. *Id.* at 2383 (quoting Doe v. Reed, 561 U. S. 186, 196 (2010)).
273. *Id.*
274. *Bonta*, 141 S. Ct. at 2390 (Thomas, J., concurring) (quoting *Doe*, 561 U. S. at 232 (2010) (Thomas, J., dissenting)).

decide which standard should be applied here or whether the same level of scrutiny should apply in all cases in which the compelled disclosure of associations is challenged under the First Amendment."[275] Future cases will determine what standard is applied in cases challenging government disclosure rules on First Amendment grounds.

In *Fulton v. City of Philadelphia, Pennsylvania*, the state stopped referring youth to Catholic Social Services, a foster care agency, because it would not certify same-sex couples due to its religious beliefs.[276] The resolution of this case turned on the question of whether the City's policy could be designated as neutral and generally applicable or whether it specifically burdened religious exercise, invoking a long standing question in First Amendment Free Exercise cases.[277] The City found that Catholic Social Services' refusal to certify same-sex couples violated the agency's contract with the City and a City non-discrimination ordinance.[278] Catholic Social Services and three foster families challenged the City's refusal as violations of the Free Exercise and Free Speech Clauses of the First Amendment.[279] A six-member majority found that the City violated the Free Exercise Clause and all justices concurred in the judgment.[280] The majority found that the City's contract allowed it to consider, on a-case-by-case basis, whether a foster agency that refused to certify same-sex couples could be granted an exception, such that the City would continue to refer foster families to the agency.[281] As such, "[t]he contractual non-discrimination requirement imposes a burden on [Catholic Social Services'] religious exercise and does not qualify as generally applicable," and the City's actions were subject to strict scrutiny.[282]

The majority then held that City's interests in "[m]aximizing the number of foster families and minimizing liability are important goals, but the City fails to show that granting [Catholic Social Services] an exception will put those goals at risk."[283] Thus, the majority held that the City's refusal to accommodate Catholic Social Services' religious beliefs failed to satisfy strict scrutiny, and violated the Free Exercise Clause of the First Amendment.[284]

Justice Barrett, joined by Justices Kavanaugh and Breyer, concurred in the judgment, pointing out that the petitioners, *amici*, and their colleagues argued that the Court ought to use this case to overrule *Employment Division v. Smith*,

275. *Id.* at 2392 (Alito, J., concurring).
276. Fulton v. City of Philadelphia, 141 S. Ct. 1868, 1883 (2021).
277. *Id.* at 1876.
278. *Id.*
279. *Id.*
280. *Id.* at 1882.
281. *Fulton*, 141 S. Ct. at 1880.
282. *Id.* at 1881.
283. *Id.* at 1881–82.
284. *Id.* at 1882.

494 U.S. 872 (1990).[285] In that case, the Court held that "a neutral, generally applicable regulatory law that compelled activity forbidden by an individual's religion" did not typically violate the Free Exercise Clause.[286] Justice Barrett opined that it was not necessary for the Court to address whether *Smith* should be overruled, since the policy at issue in this case was not neutral and generally applicable.[287]

Justice Alito wrote a concurring opinion, joined by Justices Thomas and Gorsuch, expressing the opposite view: that *Smith* should be overturned.[288] Justice Gorsuch also wrote a concurring opinion, joined by Justices Thomas and Alito, emphasizing his opinion that the Court should have addressed *Smith* in this case and overturned it.[289] Justice Alito suggested that the standard set forth in *Smith* be replaced by the following test: "A law that imposes a substantial burden on religious exercise can be sustained only if it is narrowly tailored to serve a compelling government interest."[290] Justice Gorsuch suggested that the majority's "[d]odging the question [of whether to overrule Smith] today guarantees it will recur tomorrow."[291] But for the time being, at least, the standard of review for "a neutral, generally applicable regulatory law that compelled activity forbidden by an individual's religion" remains a generous one that will usually find that such laws do not violate the Free Exercise Clause.[292]

In short, the Court seems to have profound disagreement over the standard of review for First Amendment cases. Does the same standard apply in government disclosure cases as other First Amendment cases (and what is the practical difference between "exacting scrutiny" and "strict scrutiny" anyway)?[293] Are laws that treat religious conduct more favorably than secular conduct nevertheless subject to strict scrutiny, since they discriminate between religious and secular activities?[294] Does it even matter for the purposes of reviewing an alleged First Amendment violation, whether a the challenged rule

285. *Id.* (Barrett, J., concurring).

286. Emp. Div. Dep't of Hum. Res. of Or. v. Smith, 494 U.S. 872, 880 (1989).

287. *Fulton*, 141 S. Ct. at 1882–83 (Barrett, J., concurring).

288. *Id.* at 1888 (Barrett, J., concurring).

289. *Id.* at 1931 (Gorsuch, J., concurring).

290. *Id.* at 1924 (Alito, J., concurring).

291. *Id.* at 1931 (Gorsuch, J., concurring).

292. Emp. Div. Dep't of Hum. Res. of Or. v. Smith, 494 U.S. 872, 880 (1989).

293. *Compare* Americans for Prosperity Found. v. Bonta, 141 S. Ct. 2373, 2383 (plurality opinion), *and id.* at 2391 (Alito, J., concurring), *with id.* at 2390 (Thomas, J. concurring).

294. *See* Roman Catholic Diocese of Brooklyn v. Cuomo, 141 S. Ct. 63, 80 (2020) (Sotomayor, J., dissenting) (laws that treat religious activity preferentially should not be subject to strict scrutiny).

is "neutral[and] generally applicable"?[295] The Court will undoubtedly have the opportunity to revisit these questions in the future, and it seems likely that its First Amendment jurisprudence will continue to evolve.

V. ADMINISTRATIVE PROCEDURES ACT CASES

Administrative agencies issue thousands of rules and make thousands of decisions affecting the rights of millions of people. While the actions of the agencies undoubtedly often seem remote and obscure, the public has a right to submit comments to the issuing agency when it promulgates a rule and it must consider that record of comments when finalizing it.[296] One of this term's cases demonstrates how important that record can be when a rule is challenged. *Federal Communications Commission v. Prometheus Radio Project* considered whether a reversal of policy made by the Federal Communications Commission (FCC) violated the Administrative Procedures Act (APA).[297]

This case has been going on for more than seventeen years with the parties taking four trips to the Third Circuit.[298] During a periodic review of media ownership rules, the FCC concluded that three of its rules were no longer necessary to promote competition, localism, and viewpoint diversity.[299] It also decided that the administrative record did not indicate that repealing or modifying the rules would harm minority and female ownership.[300] A number of consumer groups sued, arguing that the FCC's decision was arbitrary and capricious and not supported by the record.[301] The Third Circuit agreed, remanding to the FCC to review record evidence of the impact on female and minority ownership "whether through new empirical research or an in-depth theoretical analysis."[302]

A unanimous Court reversed, holding that the FCC's decision was not arbitrary and capricious and did not violate the APA.[303] The Court engaged in a "deferential" review to determine only whether the agency acted within a "zone of reasonableness."[304] Though the record on minority and female ownership was

295. *Smith*, 494 U.S. at 880; Fulton v. City of Philadelphia, 141 S. Ct. 1868, 1883 (2021) (Alito, J., concurring). First Amendment challenges should be reviewed under strict scrutiny, regardless of whether the challenged provision is neutral or treats First Amendment activity differently. *Id.*

296. 5 U.S.C. § 553(c).

297. Fed. Commc'ns Comm'n v. Prometheus Radio Project, 141 S. Ct. 1150, 1154–55 (2021).

298. Justin Hurwitz, *Returning to Agency Deference in Communications Law*, REG. REV. (July 21, 2020), https://www.theregreview.org/2021/07/21/hurwitz-returning-to-agency-deference-in-communications-law/.

299. *Prometheus Radio Project*, 141 S. Ct. at 1154.

300. *Id.*

301. *Id.* at 1155.

302. *Id.* at 1157 (citing 939 F.3d 567, 587 (3d Cir. 2019).

303. *Id.* at 1158.

304. *Prometheus Radio Project*, 141 S.Ct. at 1158.

sparse, the Court noted that the FCC had sought data on the issue and received none.[305] Further, while the plaintiffs asserted that the FCC ignored certain record evidence, the Court disagreed, finding that the FCC "simply interpreted [it] differently."[306] Finally, while the Court acknowledged that the record evidence was far from perfect, "the APA imposes no general obligation on agencies to conduct or commission their own empirical or statistical studies."[307]

VI. APPOINTMENTS CLAUSE CASES

This term, the Court continued to develop its jurisprudence on when the appointment of executive officials runs afoul of the Appointments Clause of Article II. Appointment Clause challenges are becoming more common, providing an additional vehicle to challenge government action beyond the APA.[308] The Court this term continued to clarify the requirements for appointment of various executive officials, and addressed whether a challenge to appointment must be first raised in the administrative proceeding.[309] But the Court remains fundamentally divided regarding what remedy is appropriate in cases where a plaintiff is harmed by an action taken by an improperly appointed official.[310]

In *U.S. v. Arthrex, Inc*., the Court considered whether administrative patent judges sitting on the Patent Trial and Appeal Board, a tribunal within the Patent and Trademark Office, were appropriately appointed.[311] The Chief Justice wrote for the majority to affirm that, under the Appointments Clause, the President alone, acting with the advice and consent of the Senate, could appoint "principle officers" within the Executive Branch, but that Congress could vest the appointment of "inferior officers" to Heads of Departments.[312] Thus, the Court considered whether the role and duties of administrative patent judges, who are appointed by the Secretary of Commerce, not the President, and do not undergo Senate confirmation, was consistent with their appointment as "inferior officers."[313]

The Court found it dispositive that administrative patent judges "have the 'power to render a final decision on behalf of the United States' without any such review by their nominal superior or any other principal officer in the

305. *Id.* at 1159.

306. *Id.*

307. *Id.* at 1160. Justice Thomas concurred and raised a separate issue, disagreeing that the FCC was even required to consider minority and female ownership. *Id.* at 1161.

308. *See supra* Part II (discussion of *Collins v. Yellen*).

309. *See* Carr v. Saul, 141 S.Ct. 1352, 1356 (2021).

310. *See* discussion *supra* Part II.

311. United States v. Arthrex, Inc., 141 S. Ct. 1970, 1977 (2021).

312. *Id.* at 1979 (citing Edmond v. United States, 520 U.S. 651, 660 (1997)).

313. *Id.* at 1979–80.

Executive Branch."[314] The Court found this arrangement was incompatible the Appointments clause, which was designed to create a clear line of political accountability from administrative decisionmakers to the President.[315] The majority thus held that the administrative patent judges whose decisions were at issue had not been properly appointed.[316]

The Chief Justice was not able to garner a majority in crafting a remedy to this problem, however.[317] His plurality opinion, joined by Justices Alito, Barrett, and Kavanaugh, proposed that Patent Trial and Appeal Board administrative patent judges be reviewable by the director of the Patent and Trademark Office, a "principal officer."[318] Justice Gorsuch dissented, stating that the better remedy would be to "simply decline[] to enforce the statute in the case or controversy at hand. . . . by identifying the constitutional violation, explaining our reasoning, and 'setting aside' the [Patent Trial and Appeal Board] decision in this case."[319]

The Court also considered, in a set of consolidated cases called *Carr v. Saul*, whether litigants forfeited their Appointment Clause arguments by failing to raise them in administrative hearings.[320] In response to a 2018 Court ruling, the acting commissioner of the Social Security Administration ratified the appointment of administrative law judges within the Administration, and then instructed its Appeals Council to vacate pre-ratification decisions and provide de novo review by a properly appointed administrative law judge only for claimants who had raised an Appointments Clause question in the administrative proceedings.[321]

Six people who had already concluded their administrative proceedings with the Social Security Administration before it instructed the Appeals Council to vacate certain pre-ratification cases, and were pursuing review of the administrative decisions in federal court, which led to a Circuit split as to whether claimants forfeited their Appointments Clause claims by failing to raise them in the administrative process.[322] Justice Sotomayor wrote for the majority to hold that claimants were not required to exhaust their Appointments Clause challenges in the administrative proceedings to raise them in federal court.[323]

The majority emphasized that while Social Security Administration proceedings were somewhat adversarial in nature, a factor that weighs in favor of allowing exhaustion, two other factors weighed against exhaustion: "First, . . .

314. *Id.* at 1981 (quoting *Edmond*, 520 U.S. at 665).
315. *Id.* at 1982.
316. *Arthrex*, 141 S.Ct. at 1985.
317. *Id.* at 1988 (Gorsuch, J., concurring in part and dissenting in part).
318. *Id.* at 1986 (plurality opinion).
319. *Id*. at 1990 (Gorsuch, J., concurring in part and dissenting in part) (citations omitted).
320. Carr v. Saul, 141 S.Ct. 1352, 1356 (2021).
321. *Id.* at 1357.
322. *Id.*
323. *Id.* at 1362.

agency adjudications are generally ill suited to address structural constitutional challenges, which usually fall outside the adjudicators' areas of technical expertise;" and "[s]econd, [the] futility exception to exhaustion requirements."[324] With respect to futility, the majority emphasized that, shortly after the Court granted cert in *Lucia*, the Social Security Administration issued internal guidance to its administrative law judges, directing them "to acknowledge any Appointments Clause objections with standardized language explaining that they 'did not have the authority to rule on that challenge.'"[325]

These cases show that there is less agreement among the Court about what remedy should be afforded in cases where a court finds that a decision was made by an improperly appointed official.[326] There is also some dispute about when someone subject to such an official's authority must challenge their appointment in order to preserve the argument for future litigation.[327] Undoubtedly, the Court will consider these issues further in future cases.

VII. CONCLUSION

In this 2020–21 term, as usual, the Court decided many cases with implications for individuals' right of access to the courts. Some of these cases are unlikely have a broad impact beyond the specific subject matter at issue. *TransUnion*, on the other hand, has the potential to significantly restrict court access for individuals raising claims that a variety of their statutory rights are being violated. At the same time, the Court showed a marked solicitude towards individual rights under the Free Exercise clause and RFRA, at the expense of government interests that may conflict with the assertion of those claims.

The Court's 2021–22 term promises to be quite different from the preceding term. It will almost certainly include blockbuster decisions that profoundly reshape the law. Among other things, the Court recently drastically curtailed the individual right to abortion. In the ongoing case *Whole Woman's Health v. Jackson*, it declined to stay a Texas law that bans most abortions after six weeks and authorizes citizens to sue abortion providers and anyone who helps to make an abortion possible.[328] Moreover, the Court dismissed a number of the

324. *Id.* at 1360–61 (citations omitted).

325. *Carr*, 141 S. Ct. at 1361 (citations omitted).

326. *Compare* United States v. Arthrex, Inc., 141 S. Ct. 1970, 1977 (2021) (plurality opinion), *with id.* at 1990 (Gorsuch, J., concurring in part and dissenting in part).

327. *Compare Carr*, 141 S. Ct. at 1360, *with id.* at 1362 (Thomas, J., concurring in part and concurring in the judgment) (social security proceedings are not adversarial, thus claimants need not raise Appointments Clause challenges at the administrative level), *and id.* at 1363 (Breyer, J., concurring in part and concurring in the judgment) (claimants generally must exhaust issues administratively to preserve them for litigation, but these claimants have shown futility such that they are excused from exhaustion).

328. Whole Woman's Health v. Jackson, 142 S. Ct. 522, 529 (2021).

defendants, making it less likely that the plaintiffs can obtain complete relief.[329] In late June 2022, the Court overturned *Roe v. Wade and Planned Parenthood of Southeastern Pennsylvania v. Casey* in its decision in *Dobbs v. Jackson*, a challenge to Mississippi's ban on abortions after fifteen weeks.[330] Finally, on the basis of its interpretation of the Occupational Safety and Health Act, the Court stayed OSHA's employer mandate requiring COVID-19 vaccination or masking in private workplaces.[331] This decision has drawn comparison to the Supreme Court's *Lochner* era when the Court struck down myriad laws attempting to protect workers.[332] In sum, advocates for civil and individual rights will almost certainly face a different—and less hospitable—legal landscape.

329. *Id.* at 539.

330. Dobbs v. Jackson Women's Health Org., No. 19–1392, 2022 WL 2276808, at *5 (U.S. June 24, 2022).

331. Nat'l Fed. of Ind. Businesses v. Dep't of Labor, 142 S. Ct. 661, 665 (2022).

332. Paul Waldman, *The Frightening Philosophy Driving the Supreme Court's New Vaccine Mandate Rulings*, WASH. POST (Jan. 13, 2022, 4:47 PM) https://www.washingtonpost.com /opinions/2022/01/13/frightening-philosophy-supreme-court/.